In the

United States Court of Appeals

For the Seventh Circuit

No. 12031

UNITED STATES OF AMERICA ex rel.
STATE OF WISCONSIN,

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION and FEDERAL HOME
LOAN BANK BOARD,

APPENDIX FOR PLAINTIFF APPELLANT

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IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

United States of America ex rel.
State of Wisconsin,
Plaintiff-Appellant,
vs.
First Federal Savings and Loan
Association,
Defendant-Appellee,
Federal Home Loan Bank Board,
Intervening Defendant-Appellee.

PREFIX TO RECORD.

The above action was commenced on December 6, 1954 by the State of Wisconsin against the First Federal Savings and Loan Association. On March 16, 1956 the Federal Home Loan Bank Board asked leave to intervene and on March 29, 1956 the Federal Home Loan Bank Board was granted leave to intervene. The respective pleadings were filed on the dates indicated on the Index to the Record. On motion of the defendants, the Court dismissed the proceedings on March 19, 1957. Notice of Appeal was filed April 7, 1957 by the State of Wisconsin.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

United States of America ex rel. State of Wisconsin, *Plaintiff*, v. First Federal Savings and Loan Association, *Defendant.*	Civil Action No. 647

PETITION FOR LEAVE TO FILE AN INFORMATION IN THE NATURE OF QUO WARRANTO AND FOR A RULE TO SHOW CAUSE.

(Filed Dec. 6, 1954. B. H. Westfahl, Clerk.)

The petition of the plaintiff herein upon the relation of the State of Wisconsin, acting through its Attorney General Vernon W. Thomson, respectfully represents and shows to the court:

1. That the defendant herein, First Federal Savings and Loan Association of Milwaukee, a federally chartered association, has publicly asserted and continues to assert that it has some charter or franchise whereby it has the right to establish receiving stations in connection with its savings and loan business in the city of Milwaukee.

2. That no charter has been issued to said defendant by the plaintiff herein nor by any other governmental agency known to plaintiff or your relator which contains any valid provision conferring upon defendant such right or franchise.

3. That the establishment of such receiving stations is flatly prohibited by the provisions of sec. 215.02 (20) of the Statutes of the State of Wisconsin.

2 4. That the details of said usurpation of authority are set forth in summary form in the proposed information which is annexed hereto and made a part hereof by reference, the same as if set forth in full in this petition.

Wherefore, Petitioner prays that a rule issue out of this honorable court directed to defendant ordering and directing defendant to show cause, if any it has, why leave should not be granted to file an information in the nature of a quo warranto in the form and style of the information annexed hereto.

Dated this 3rd day of December, A. D. 1954.

VERNON W. THOMSON,
Attorney General of Wisconsin,
STEWART G. HONECK,
Deputy Attorney General,
HAROLD H. PERSONS,
Assistant Attorney General,
ROY G. TULANE,
Assistant Attorney General,
Attorneys for Plaintiff State of Wisconsin.

Verification.

State of Wisconsin, } ss.
County of Dane. }

Stewart G. Honeck, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner named in the foregoing petition, that he has read the said petition and that the same is true to his
3 own knowledge, that the source of his knowledge is an examination of the rules and regulations of the Home Loan Bank Board and information conveyed to him in the course of his duties by officials of the State of Wisconsin.

That the reason that this verification is not made by relator is that the relator is a sovereign state and can act only through its agents.

STEWART G. HONECK.

Subscribed and sworn to before me this 3rd day of December, A. D. 1954.

Iona Farrell,
Notary Public,
Dane County, Wisconsin.

(Seal)

My Commission expires Feb. 24, 1957.

4 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—6475) * *

PROPOSED INFORMATION IN THE NATURE OF QUO WARRANTO.

(Filed Dec. 6, 1954. B. H. Westfahl, Clerk.)

The United States of America upon the relation of the State of Wisconsin acting through its Attorney General Vernon W. Thomson, and at the request of its Governor Walter J. Kohler, respectfully informs the court as follows:

1. That the relator State of Wisconsin is one of the 48 sovereign states of the United States of America; that said relator has a two-fold interest in this proceeding, one as *parens patriae*, or representative of the public, and two, as operator and trustee of the veterans housing fund of the State of Wisconsin which has outstanding almost $30,000,000 in loans upon homes of veterans in the State of Wisconsin; that most of said loans are secured by second mortgages which are junior to first mortgages held by state and federally chartered savings and loan institutions and other supervised lending agencies; that the security of said second mortgages is dependent upon the maintenance of

a sound system of financial institutions in the State of Wisconsin.

2. That the defendant First Federal Savings and Loan Association of Milwaukee, Wisconsin, doing business at 730 North Water Street, is an association chartered by the United States of America on February 20, 1934 under the provisions of section 5 of the Home Loaners Act of 1933 as amended, 12 U. S. C. A. §1464, and the Rules and Regulations for Federal Savings and Loan Associations adopted by the Federal Home Loan Bank Board, which, by virtue of various federal reorganizations is now known and designated as the Home Loan Bank Board.

3. That by the provisions of the organic act, section 5 of the Home Owners Loan Act of 1933 as amended, the original Federal Home Loan Bank Board was required by the Congress of the United States, in promulgating its regulations to give primary consideration to the best practices of local mutual thrift and home financing institutions in the United States, to refuse to grant a charter without a determination of the Board itself that a need existed for an association in the particular community to be served, and to find that such association could be established without injury to existing local savings and loan and other home financing institutions.

4. That in many localities of the United States including the State of Wisconsin the practices found best for the maintenance of a sound system of local home financing institutions forbade the establishment of branch agencies including both branch banks and branch agencies of savings and loan associations, and forbade the establishment of an agency of any kind without any examination and approval, by some properly authorized government agency, of its proposed location in regard to the location of existing agencies; that the soundness of conforming federal law to local practices has been recognized by the Congress

itself in regard to national banks by the provisions of the McFadden Act, which reads in part, Title 12 U. S. C. A. § 36(c):

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such etsablishment and operation are at the time expressly authorized to state banks by the law of the State in question; [here follow similar provisions]"

5. That notwithstanding the express directive from the Congress of the United States the Federal Home Loan Bank Board in promulgating its original rules for the granting of charters to federal savings and loan associations not only ignored the fact that the best practices in many localities forbade the establishment of branch agencies, but in regard to certain agencies known as receiving agencies absolutely and completely abdicated its responsibility to pass upon the number and location of such agencies as might be established; that the said board attempted to subdelegate the powers which had been delegated to it by the Congress to each and all of the federally chartered associations themselves.

6. That the provision of its rules and regulations by which this subdelegation of delegated authority was attempted is regulation No. 145.15 which reads in part:

> "A Federal Association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned or to any combination of such functions, * * *"

That said purported rule is null and void in that it is beyond the powers delegated to the Home Loan Bank Board by Congress and is an invalid subdelegation of the

powers of the board itself, and hence is not a part of the charter issued to defendant by the United States.

7. That the establishment of branch or receiving agencies of savings and loan associations in the state of Wisconsin is prohibited by sec. 215.02 (20) of the Statutes of the State of Wisconsin which reads:

> "One Office Only. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

That there is no federal statute or valid federal regulation contrary to the foregoing state statute; that there is no paramount federal regulation within the meaning of the rule in *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 44 S. Ct. 213, 68 L. ed. 486, and hence the state statute is controlling.

8. That notwithstanding the lack of power to do so under its charter from the United States, and in spite of the prohibitions against such action in the controlling statutes of the state of Wisconsin, defendant has announced its intention to, made preparation to, and has established three receiving agencies in the county of Milwaukee on the first day of November, 1954, located at 4433 W. Fond du Lac Avenue, Milwaukee, Wisconsin, 925 Milwaukee Avenue, South Milwaukee, Wisconsin, 6000 West Oklahoma Avenue, Milwaukee, Wisconsin, and that it will continue to maintain such stations unless restrained therefrom by this honorable court.

9. That in so asserting the right to maintain receiving agencies defendant is asserting and usurping a prerogative and franchise not conferred upon it by its charter, and is invading the sovereign prerogatives of the plaintiff herein by whom the said charter was granted. That by so abusing the franchise granted to it by its charter it has

forfeited all right entitled thereto and is subject to a judgment of ouster in favor of the sovereign.

10. That under date of October 29, 1954 your petitioner made a formal demand upon the Attorney General of the United States that he filed an information in the nature of a quo warranto against the defendant herein for the purpose of securing a judgment of ouster based on the usurpations above described. That by letter dated November 5, 1954 the Attorney General of the United States formally declined to file such an information.

Wherefore, Relator respectfully prays that the defendant make its return before this honorable court stating and declaring by what right it asserts a charter and franchise to establish receiving stations in the state of Wisconsin and county of Milwaukee at a distance from its principal location, and that in default thereof a judgment of ouster issue vacating and forfeiting the charter asserted by respondent.

Dated this 3rd day of December, A. D. 1954.

Vernon W. Thomson,
Attorney General of Wisconsin,

Stewart G. Honeck,
Deputy Attorney General,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,
Attorneys for Plaintiff,
State of Wisconsin.

9 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

RULE TO SHOW CAUSE.

(Filed Dec. 6, 1954. B. H. Westfahl, Clerk.)

Upon reading and filing the petition of the United States of America upon the relation of the State of Wisconsin, and the proposed information annexed thereto, and upon motion of the Attorney General of Wisconsin

It Is Ordered

That the defendant herein named, First Federal Savings and Loan Association, show cause if any it has before this Honorable Court on the 27th day of December, A. D. 1954, at 2 o'clock P. M. in the court room of the United States District Court in Milwaukee, Wisconsin, why leave to file the proposed information should not be granted.

Let a copy of this rule be served upon the defendant herein forthwith.

Dated, December 6, 1954.

Robert E. Tehan,
District Judge for the Eastern District of Wisconsin.

Eastern District of Wisconsin } ss:

I hereby certify and return that I served the within Rule To Show Cause on the within named First Federal Savings and Loan Association by delivering to and leaving with C. J. Vogt, Vice President personally a true copy thereof this 14th day of December, A. D. 1954 at 730 North Water Street, Milwaukee, Wisconsin.

Service—$2.00.

Clemens F. Michalski,
U. S. Marshal,
By Russell C. Knight,
Deputy U. S. Marshal.

10 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

ORDER.

(Filed Feb. 10, 1956. Dale E. Ihlenfeldt, Clerk.)

The plaintiff having filed a petition herein upon the relation of the State of Wisconsin, acting through its Attorney General Vernon W. Thomson, for leave to file an information in the nature of quo warranto, requiring the defendant to declare by what right it asserts a charter and franchise to establish receiving stations in the State of Wisconsin and County of Milwaukee at a distance from its principal location, and in default thereof asking that a judgment of ouster issue vacating and forfeiting the charter asserted by the respondent;

And said petition having come on to be heard, and the Court having heard the arguments of counsel, and having considered the record in this matter and the briefs submitted by the parties;

And the Court being of the opinion that the sole question presently before the Court is whether or not there is a substantial issue presented which should be subject to a judicial determination with a full opportunity for both parties to be heard;

11 And the Court being further of the opinion that a substantial issue is presented and that in the exercise of sound discretion, leave should be granted to the petitioner to file its proposed information in the nature of quo warranto;

Now, Therefore, It Is Ordered: That the petitioner be and hereby is granted leave to file its information in the nature of quo warranto.

It Is Further Ordered: That the defendant shall have twenty (20) days from the date of this order in which to answer or otherwise plead.

Dated, Milwaukee, Wisconsin, this 10th day of February, 1956.

Robert E. Tehan,

U. S. District Judge.

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d), F. R. C. P., and Rule 21-A of District Court.

12 In the United States District Court.

* * (Caption—6475) * *

ANSWER.

(Filed Feb. 17, 1956. Dale E. Ihlenfeldt, Clerk.)

Now comes the defendant, First Federal Savings and Loan Association of Wisconsin, in the above stated case, and, subject to its motion to dismiss, heretofore filed, files this as its answer and says that:

1. Defendant admits that the State of Wisconsin is one of the forty-eight sovereign states of the United States of America, and denies the remainder of said paragraph.
2. Paragraph 2 is denied.
3. Paragraph 3 is admitted.
4. Paragraph 4 is denied.
5. Paragraph 5 is denied.
6. Defendant admits the quotation in paragraph 6 from Section 145.15 of the Rules and Regulations for Federal Savings and Loan Associations, and denies the remainder of said paragraph.
7. Defendant admits Section 215.02 (20) of the Statutes of the State of Wisconsin, as quoted, and denies the remainder of said paragraph.

13 8. Defendant admits the establishment of agencies at the locations stated, but denies that they are "receiving agencies" and says that the same were established and are operated pursuant to Section 145.15 of the Rules and Regulations for Federal Savings and Loan Associations and specifically, pursuant to that portion thereof quoted in paragraph 6 of the Information in the nature of a quo Warranto and not otherwise.

9. Paragraph 9 is denied.

10. For lack of sufficient information, the defendant neither admits nor denies the allegations of paragraph 10.

Wherefore, defendant prays that it be discharged hence with its costs.

Horace Russell,
Attorney for Defendant,
7 S. Dearborn St., Chicago 3, Ill.

Jack C. Werner,
Attorney for Defendant,
741 N. Milwaukee St.,
Milwaukee 2, Wis.

14 State of Illinois, } ss:
County of Cook. }

Horace Russell, being first duly sworn, deposes and says that he served foregoing Answer upon the following named parties:

Vernon W. Thomson, Esq.,
Attorney General for State of Wisconsin,
Madison, Wisconsin.

Stewart G. Honeck, Esq.,
Deputy Attorney General for State of Wisconsin,
Madison, Wisconsin.

Harold H. Person, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin.

Roy G. Tulane, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin.

Jack C. Werner, Esq.,
741 North Milwaukee St.,
Milwaukee 2, Wisconsin.

Edward G. Minor,
United States Attorney,
Milwaukee 2, Wisconsin.

by mailing copies of the same to each of said parties, at the addresses stated above, by depositing the envelopes, postage prepaid, properly addressed, in the mail chute at 7 South Dearborn Street, Chicago 3, Illinois, at 10:00 o'clock A. M. Thursday, February 16, 1956.

Horace Russell.

Subscribed and sworn to before me this 16th day of February, 1956.

Alice Morrissey,
Notary Public.

(Seal)

15 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MOTION.

(Filed Feb. 17, 1956. Dale E. Ihlenfeldt, Clerk.)

Now comes the defendant, First Federal Savings and Loan Association of Wisconsin, and moves the Court to dismiss the information in the nature of quo warranto stated above on the grounds that:

1. This Court has no jurisdiction of such action.
2. The plaintiff states no cause of action.
3. The Congress delegated to the Federal Home Loan Bank Board full power to make rules and regulations for the organization, operation and liquidation of Federal Savings and Loan Associations and to administer the statute and rules and regulations affecting them and to adjudicate disputes arising thereunder, and the plaintiff can have no standing in this Court until administrative remedies have been exhausted, and the pleadings in this case do not show that administrative remedies have been exhausted.

Wherefore, the defendant prays that the proceedings be dismissed.

Horace Russell,
Attorney for Defendant,
7 S. Dearborn St.,
Chicago 3, Ill.,

Jack C. Werner,
Attorney for Defendant,
741 N. Milwaukee St.,
Milwaukee 2, Wis.

16 State of Illinois, } ss.
County of Cook. }

Horace Russell, being first duly sworn, deposes and says that he served foregoing Motion upon the following named parties:

Vernon W. Thomson, Esq.,
Attorney General for State of Wisconsin,
Madison, Wisconsin;

Stewart G. Honeck, Esq.,
Deputy Attorney General for State of Wisconsin,
Madison, Wisconsin;

Harold H. Person, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin;

Roy G. Tulane, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin;

Jack C. Werner, Esq.,
741 North Milwaukee St.,
Milwaukee 2, Wisconsin;

Edward G. Minor,
United States Attorney,
Milwaukee 2, Wisconsin;

by mailing copies of the same to each of said parties, at the addresses stated above, by depositing the envelopes, postage prepaid, properly addressed, in the mail chute at 7 South Dearborn Street, Chicago, 3, Illinois, at 10:00 o'clock A. M. Thursday, February 16, 1956.

Horace Russell.

Subscribed and sworn to before me this 16th day of February, 1956.

Alice Morrissey,
Notary Public.

(Notarial Seal)

17 UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

ORDER FOLLOWING PRE-TRIAL CONFERENCE.

(Filed Feb. 23, 1956. Dale E. Ihlenfeldt, Clerk.)

The parties having appeared by their respective counsel at a pre-trial conference in the above matter, held, pursuant to notice, on February 23, 1956, and said counsel having so agreed,

It Is Ordered: That the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustices:

1. On March 8, 1956, at 10:00 o'clock A. M., relator will take the depositions of the manager of defendant's "service stations" and of one of the office secretaries thereof.

2. Not later than March 20, 1956, relator will move for summary judgment submitting therewith a brief or a statement that no brief will be filed.

3. Not later than March 27, 1956, defendant will file its answering brief.

4. On March 29, 1956, at 2:00 o'clock P. M., the court will hear oral arguments on the motion for summary judgment and the merits of the case.

Dated, Milwaukee, Wisconsin, this 23rd day of February, 1956.

Robert E. Tehan,
U. S. District Judge.

18 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

FIRST AMENDMENT OF ANSWER.

(Filed Mar. 16, 1956. Dale E. Ihlenfeldt, Clerk.)

Now comes the defendant, First Federal Savings and Loan Association of Wisconsin, in the above case, and amends Paragraph 2 of its Answer to read as follows:

"2. Paragraph 2 is admitted."

Wherefore, defendant prays that this amendment be allowed.

Horace Russell,
Attorney for Defendant,
7 S. Dearborn St.,
Chicago 3, Ill.,

Jack C. Werner,
Attorney for Defendant,
741 N. Milwaukee St.,
Milwaukee 2, Wis.

The foregoing Amendment presented and allowed, subject to objections, and ordered to be filed this 16th day of March, 1956.

Robert E. Tehan,
United States Judge.

19 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

NOTICE OF MOTION BY THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE AND POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION BY THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE.

(Filed Mar. 16, 1956. Dale E. Ihlenfeldt, Clerk.)

To: Honorable Vernon W. Thomson,
Attorney General for State of Wisconsin,
Madison, Wisconsin;

Messrs. Russell and Bridewell,
Attorneys at Law,
7 South Dearborn Street,
Chicago 3, Illinois;

Mr. Jack Werner,
Attorney at Law,
741 North Milwaukee Street,
Milwaukee 2, Wisconsin.

Please Take Notice: That the attached Motion by the United States and the Federal Home Loan Bank Board for Leave to Intervene and Points and Authorities in Support of the Motion by the United States and the Federal Home Loan Bank Board for Leave to Intervene will be brought on for hearing at a time to be designated by the Clerk of Court before the Honorable Robert E. Tehan, United States District Judge, in his Court Room, Federal Building, Milwaukee, Wisconsin.

Dated this 16th day of March, 1956.

Edward G. Minor,
United States Attorney,
Attorney for Plaintiffs.

20 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

MOTION BY THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE.

Pursuant to Rule 24, Federal Rules of Civil Procedure, the United States and the Federal Home Loan Bank Board, an agency in the executive branch of the United States, move the Court for leave to *intervene in this action* in order to assert their interests affected by this action.

This case involves two important issues of public law: (1) whether the State of Wisconsin has authority to use the name of the United States in maintaining an action in the nature of quo warranto; and (2) the validity of regulation of the Federal Home Loan Bank Board permitting the establishment of agencies by federal savings and loan associations, which issue involves the construction of an Act of Congress.

This intervention for the purpose of submitting the views of the executive branch of the Government will in no way prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

21 Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice, Attorneys for the United States and the Federal Home Loan Bank Board.

22 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE.

The United States requests permission to intervene because this action involves the important question of whether the State of Wisconsin has authority to use the name of the United States in maintaining an action in the nature of quo warranto. Congress has provided that the interests of the United States, when involved in any law suit, shall be represented by the Attorney General of the United States or other officials of the Department of Justice. 5 U. S. C. 309, 316. It is the duty of United States Attorneys to prosecute "for the Government, all civil actions, suits or proceedings in which the United States is concerned." 28 U. S. C. 507. The United States contends that the State of Wisconsin has no authority to bring this proceeding in the name of the United States. The State of Wisconsin contends that it does have such authority. Thus, it is clear that the defense raised by the United States and the main action have a question of law in common and, therefore, intervention should be permitted. See *Securities and Exchange Commisison* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 458-460.

The Federal Home Loan Bank Board requests permission to intervene because the present action involves the interpretation of the Home Owners' Loan Act of 1933, which is administered by the Federal Home Loan Bank Board, and the validity of a regulation promulgated by the Federal

23 Home Loan Bank Board. Rule 24(b)(2), Federal Rules of Civil Procedure, provides that an agency may be

permitted to intervene in an action when a party to the action relies for ground of claim or defense upon any statute or regulation administered or promulgated by the agency. See *All American Airways Inc.* v. *Village of Cedarhurst*, 201 F. 2d 723; *West India Fruit & Steamship Co.* v. *Seatrain Lines Inc.*, 170 F. 2d 775, cert. dismissed on motion of petitioner, 336 U. S. 908.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice, Attorneys for the United States and the Federal Home Loan Bank Board.

26 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

NOTICE OF MOTION AND MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO.

To: Honorable Vernon W. Thomson,
Attorney General for State of Wisconsin,
Madison, Wisconsin;

Messrs. Russell and Bridewell,
Attorneys at Law,
7 South Dearborn Street,
Chicago 3, Illinois;

Mr. Jack Werner,
Attorney at Law,
741 North Milwaukee Street,
Milwaukee 2, Wisconsin.

Please Take Notice: That the attached Motion to Dismiss the Information in the Nature of Quo Warranto and Memorandum of Points and Authorities in Support of Motion to Dismiss the Information in the Nature of Quo Warranto will be brought on for hearing at a time to be designated by the Clerk of Court before the Honorable Robert E. Tehan, United States District Judge, in his Court Room, Federal Building, Milwaukee, Wisconsin.

Dated this 16th day of March, 1956.

Edward G. Minor,
United States Attorney,
Attorney for Plaintiffs.

27 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO.

The United States and the Federal Home Loan Bank Board, intervenors, respectfully move this Court to dismiss the Information in the Nature of Quo Warranto, filed by the Attorney General of the State of Wisconsin, in the name of the United States on the relation of the State of Wisconsin, on the grounds that the Court lacks jurisdiction to grant the relief requested; that the State of Wisconsin has no authority to use the name of the United States in maintaining an action in the nature of quo warranto; and that the information fails to state a claim upon which relief can be granted.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice, Attorneys for the United States, and the Federal Home Loan Bank Board.

28 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO.

Preliminary Statement.

The Attorney General of the State of Wisconsin has filed, in the name of the United States, an Information in the Nature of Quo Warranto, asking the First Federal Savings and Loan Association of Milwaukee, Wisconsin, to declare by what right it asserts a charter and franchise to establish receiving stations in the State of Wisconsin at a distance from its principal location.

The United States and the Federal Home Loan Bank Board, which have intervened in this action pursuant to leave granted by this Court, have moved to dismiss the Information in the Nature of Quo Warranto.

Statement of Facts.

The Attorney General of the State of Wisconsin has filed, in the name of the United States on the relation of the State of Wisconsin, an information in the nature of quo warranto against a federal savings and loan association in Milwaukee, Wisconsin, which has been chartered by the Federal Home Loan Bank Board under the Home Owners' Loan Act of 1933.

The Federal Home Loan Bank Act (Act of July 22, 1932, 47 Stat. 725, 12 U. S. C. 1421 et seq.) and the Home Owners' Loan Act of 1933 (Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. 1461 et seq.), authorize the Federal Home Loan
29 Bank Board, an unincorporated agency in the executive branch of the Government, to issue charters for the

creation of federal savings and loan associations (see 12 U. S. C. 1437, 1464). These savings and loan associations are "local mutual thrift institutions in which people may invest their funds," and with limited exceptions they may make loans only on first mortgages on "homes or combination of homes and business property within fifty miles of their home office" (12 U. S. C. 1464).

The operation of these savings and loan associations is strictly limited and regulated by these statutes and by rules and regulations which the Bank Board has promulgated pursuant to its statutory authorization (12 U. S. C. 1464; 24 C. F. R., Chap. I(C)). The statute itself contains no provisions as to the manner in which or conditions on which the Bank Board may authorize savings and loan associations to establish agencies; this is left to the Bank Board's rules and regulations. These provide:

> § 145.15. *Agency.* • • • A Federal association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs. (24 C. F. R., 1954 Supp. to 1949 Ed., § 145.15.)[1]

The defendant savings and loan association proposes to establish in Milwaukee three such agencies which, as limited

1. This regulation also contains provisions for the establishment by a federal savings and loan association of branch offices, which may perform more comprehensive functions than agencies. These are not, however, relevant to this case.

by the regulation quoted above, may merely service loans and contracts of the association or manage or sell real estate owned by the association.

The Attorney General of Wisconsin considers that the establishment of such agencies (termed "receiving stations" in his petition) is prohibited by Wisconsin Statutes, § 215.02(20), which provides:

> No savings and loan association or building and loan association carrying on business in this State shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state.

The Attorney General of Wisconsin further considers that the regulation of the Home Loan Bank Board authorizing federal associations to establish agencies is unauthorized and invalid and apparently also considers that if the act does authorize this regulation it is an unconstitutional delegation of legislative authority.

The Attorney General of Wisconsin requested the Attorney General of the United States to institute a quo warranto proceeding against the Milwaukee savings and loan association but he declined to do so, on the ground that the authority of the Home Loan Bank Board to authorize federal savings and loan associations to establish branches or agencies has been upheld by the courts.[2]

The information seeks to have the charter of the Milwaukee association forfeited.

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2. A copy of the letter from Assistant Attorney General Burger to the Attorney General of Wisconsin refusing the latter's request to institute quo warranto proceedings is attached as an appendix to this brief.

Argument.

I.

This Court has no jurisdiction to entertain a quo warranto proceeding.

The federal district courts have, of course, only such jurisdiction as Congress has conferred upon them. As we show below, no statute specifically confers quo warranto jurisdiction on the district courts (except in the District of Columbia). The authorities indicate that the district courts do not have any such jurisdiction. *Morin* v. *City of Stuart*, 111 F. 2d 773, 775 (C. A. 5); *Cleveland Cliffs Iron Co.* v. *Village of Kinney*, 262 Fed. 980, 984 (D. Minn.); *In re Yancey*, 28 Fed. 445, 451 (C. C. W. D. Tenn.); 15 Cyc. Fed. Proc. (3rd ed.) § 85.01; Foster, Federal Practice (6th ed.) § 468a.

31 Wisconsin relies upon two provisions of the Judicial Code: 28 U. S. C. 1651(a) and 28 U. S. C. 1345. We submit that neither section gives jurisdiction over the proceeding.

A. *The "all writs" section of the Judicial Code, 28 U. S. C. 1651(a), does not confer jurisdiction; it is applicable only to confer ancillary jurisdiction where jurisdiction is otherwise granted.* This section by its terms merely grants the federal courts authority to issue writs "in aid of their respective jurisdictions." It does not by itself confer jurisdiction over any type of action. *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Knapp* v. *Lake Shore Railway Co.*, 197 U. S. 536; *Marshall* v. *Crotty*, 185 F. 2d 622, 626-7 (C. A. 1); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C. A. 9); *Amchanitzky* v. *Sinnett*, 69 F. 2d 97 (C. A. 2). See also *Rosenbaum* v. *Bauer*, 120 U. S. 450, 453-6; *McIntire* v. *Wood*, 7 Cr. 504; *Bath County* v. *Amy*, 13 Wall. 244.

B. *Jurisdiction over this action is not conferred by 28 U. S. C. 1345.* That section of the code grants district courts jurisdiction of "all civil actions, suits or proceedings commenced by the United States," "Except as otherwise provided by Act of Congress * * *" Whether a district court would have jurisdiction of a quo warranto brought by the Attorney General of the United States on behalf of the United States (See *Territory* v. *Lockwood*, 3 Wall. 236, 240; *Wallace* v. *Anderson*, 5 Wheat. 291) need not be decided here. For the United States, acting through its Attorney General, has refused to bring such an action. Assuming for the moment that the State of Wisconsin is authorized to bring the proceeding in the name of the United States (which we deny; see p. 6 below), the United States is "but a nominal party." *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 157. In essence this is a suit by the State of Wisconsin. 28 U. S. C. 1345 confers jurisdiction of proceedings in which the United States asserts a claim, but not, as here, where a state asserts a claim.

Furthermore, as we show below, 28 U. S. C. 1345 is inapplicable because as to quo warranto proceedings Congress has "otherwise provided."

32 C. *Congress has vested federal quo warranto jurisdiction solely in the district court for the District of Columbia.* The Revised Statutes of 1878 specifically vested both the district courts and the former circuit courts with jurisdiction of proceedings in quo warranto brought by a United States Attorney for the removal of persons holding office contrary to the Fourteenth Amendment (*i.e.*, persons who had engaged in insurrection against the United States). Rev. Stat., §§563(14), 629(14), 1786. Significantly, these grants of jurisdiction were in addition to the separate grants of jurisdiction to these courts of suits at common law and in equity where the United States was plaintiff. Rev. Stat. §§563(4), 629(2)(3).

This limited grant of quo warranto jurisdiction was, however, repealed by the Judicial Code of 1911. 36 Stat. 1087, 1168. And the duty imposed on United States Attorneys to bring quo warranto proceedings of the type authorized by the Revised Statutes was repealed by the 1948 revision of the Judicial Code. Act of June 25, 1948, 62 Stat. 869, 992-3.

In the meantime Congress enacted in 1901 a code of law for the District of Columbia which specifically authorizes the district court for the District of Columbia (formerly called the Supreme Court of the District) to issue quo warranto in the name of the United States on application of the Attorney General. Act of March 3, 1901, 31 Stat. 1189, 1419-20, District of Columbia Code, §16-1601. See *Newman v. United States ex rel. Frizzell*, 238 U. S. 537, for a discussion of this statute.

The repeal of the quo warranto jurisdiction given by the Revised Statutes, together with the grant of such jurisdiction to the district court for the District of Columbia alone, makes it plain that the district courts outside the District of Columbia have no quo warranto jurisdiction.

Since this court has no jurisdiction to entertain the information filed by the Wisconsin Attorney General, this information should be dismissed.

33

II.

The State of Wisconsin has no authority to bring this proceeding in the name of the United States and the proceeding is not truly one brought by the United States.

The United States, acting through its Attorney General, has refused to bring this action. Yet the Attorney General of Wisconsin presumes to use the name of the United States as plaintiff here. What is his authority for doing so? We think he has none.

No Act of Congress authorizes a state to bring quo warranto in the name of the United States. On the contrary, Congress has provided that the interests of the United States, when involved in any law suit, shall be represented by the Attorney General of the United States or other officials of the Department of Justice. 5 U. S. C. 309, 316. See *Booth* v. *Fletcher*, 101 F. 2d 676, 679-82 (C. A. D. C.); *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278-84.

28 U. S. C. 507 makes it the duty of United States Attorneys to prosecute "for the government, all civil actions, suits or proceedings in which the United States is concerned." The Attorney General of Wisconsin has no authority to maintain this proceeding in the name of the United States. See *Confiscation Cases*, 7 Wall. 454, 457; *United States ex rel. West* v. *Doughty*, Fed. Cas. No. 14,986 (S. D. N. Y.); *United States* v. *1,960 Acres of Land*, 54 F. Supp. 867, 872-4, same case, *United States* v. *Hall*, 145 F. 2d 781 (C. A. 9). Apposite here is the opinion of Mr. Justice Johnson in *United States* v. *Morris*, 10 Wheat. 246, 301, in affirming Fed. Cas. No. 15,816 (C. C. D. N. Y.):

> * * * How, in fact, the name of the United States comes at all to be used in this cause, is to me a mystery. * * * That the name of the United States should be used against its will, and an attorney for the United States nominated by a judge, to act where the attorney of the United States refuses to act, and that without any authority by statute, I acknowledge has excited my surprise.

Where Congress desires to permit the name of the United States to be used by some other person or entity in bringing a law suit, it specifically so provides. See, as examples, 40 U. S. C. 270b; 25 U. S. C. 201; 31 U. S. C. 232(B).

34 In the field of quo warranto Congress permits such a proceeding to be brought in the name of the United States by other persons under certain circumstances, but

only if the action is brought in the District of Columbia. See page 5, above.

Furthermore the bringing of this action in the name of the United States violates Rule 17(a), which requires every action to be prosecuted in the name of the real party in interest[3] and provides that an action for the use and benefit of another shall be brought in the name of the United States "where a statute of the United States so provides • • •" No statute provides for bringing a quo warranto action in the name of the United States in this Court.

A second and independent ground for dismissing this information is, therefore, the fact that the State of Wisconsin has no authority to bring this proceeding in the name of the United States.

III.

Even if this Court has jurisdiction of this proceeding it should, as a matter of discretion, dismiss the Information.

As we have shown, we do not think this Court has any quo warranto jurisdiction. But if the Court should disagree with our jurisdictional contentions, we submit that it should, as a matter of discretion, dismiss the information, for two reasons: (1) it is by no means clear that any violation of Wisconsin law is threatened; and (2) in any event Wisconsin has other available remedies to test the issue.

Quo warranto is an extraordinary remedy granted not as a matter of right but only in the sound discretion of

3. Since the basic purpose of the proceeding is to stop an alleged violation of Wisconsin law, Wisconsin is obviously the real party in interest. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 157; *First National Bank* v. *Missouri*, 263 U. S. 640, 660.

the Court. High, Extraordinary Legal Remedies (3rd Ed.), pp. 558-9, 639-41.

A. *It is doubtful that the use of agencies by a federal savings and loan association is even purportedly prohibited by Wisconsin law.* Chapter 215 of the Wisconsin statutes is a comprehensive code governing savings and loan associations. It explicitly distinguishes between (1) associations organized under Wisconsin law; (2) associations organized under laws of other states which do business in Wisconsin; and (3) *federal* savings and loan associations such as the Milwaukee association involved here. See the definitions in §§ 215.01(2)(10)(11), 215.80. The statute provides for supervision of Wisconsin associations and associations of other states doing business in Wisconsin, but recognizes that Wisconsin cannot regulate federal associations. §§ 215.52, 215.67(2), 215.80-215.88.

The Attorney General of Wisconsin assumes without discussion that the section prohibiting any "savings and loan association or building and loan association carrying on business in this state" from operating agencies (§ 215.02(20)) is applicable to federal as well as state associations. With all due respect to the Attorney General of Wisconsin as an authoritative interpreter of Wisconsin statutes, we submit that the statute seems to indicate otherwise. Apparently, there are no judicial constructions of this section.

In the first place, when the Wisconsin statute intends to refer to federal associations it so describes them. See §§ 215.01(10), 215.67. In the second place, the agency prohibition provisions is a part of § 215.02, headed "Incorporation". That section provides for incorporation of a "savings and loan association" by the state commissioner of savings and loan associations upon application by citizens of Wisconsin. That incorporation procedure obviously

has no application to federal associations, which are chartered by the Federal Home Loan Bank Board. So it seems logical to construe § 215.02(20) as intended to apply only to state associations. In the third place, it seems a fair assumption that the Wisconsin legislature enacted this chapter with recognition of the constitutional impediment to state control of a corporation chartered pursuant to an Act of Congress (*Franklin National Bank* v. *New York*, 347 U. S. 373), where, as here, the federal law contains no indication of a Congressional purpose to subject these federal associations to state regulation as to branches or agencies. Compare the difference in Congressional
36 approach in this respect between the Home Owners' Loan Act of 1933 and the National Bank Act, as recognized in *Springfield Institution for Sav.* v. *Worcester Federal Savings & Loan Ass'n*, 107 N. E. 2nd 315, 318 (Mass.); *People of State of California* v. *Coast Federal Savings & Loan Ass'n.*, 98 F. Supp. 311, 319 (S. D. Cal.); *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Ass'n.*, 187 F. 2d 564, 567 (C. A. 3). See also *First Federal Savings & Loan Ass'n. of Wisconsin* v. *Loomis, Atty. Gen. of Wisconsin*, 97 F. 2d 831 (C. A. 7), affirming that a federal savings and loan association "is under the sole authority and control of the laws of the United States".

Accordingly, the fact that the Wisconsin statute is apparently not intended to apply to federal associations in this respect should dispose the Court to exercise its discretion and dismiss the information.

B. *The information should be dismissed because Wisconsin has other available remedies to test the issue involved.* Quo warranto, as a discretionary writ, will not be granted where the complaining party has other available remedies, either in law or equity. High, Extraordinary Legal Remedies (3rd Ed.), pp. 572, 607.

The Attorney General of Wisconsin asserts that the es-

tablishment of agencies by the Milwaukee Association is (1) unauthorized by the federal statute pursuant to which the association is organized; and (2) is a violation of the state prohibition against agencies. As to the association's alleged lack of authority under federal law, that is obviously a matter of no concern to Wisconsin. If an authority granted by Congress is being abused, the federal government, not the State, is the one to take corrective measures. The State may not bring quo warranto to assert this federal interest. *First National Bank* v. *State of Missouri,* 263 U. S. 640, 660; *Territory* v. *Lockwood,* 3 Wall. 236; *Wallace* v. *Anderson,* 5 Wheat. 291; *Newman* v. *United States ex rel. Frizzell,* 238 U. S. 537; *Johnson* v. *Manhattan Railway Co.,* 289 U. S. 479, 502.

37 *First National Bank* v. *State of Missouri,* 263 U. S. 640, 660, would seem to establish that the State of Wisconsin has a justiciable interest in the question as to whether the Milwaukee association here involved is acting in violation of state law. But as that case shows, the appropriate remedy for the state is to bring quo warranto proceedings in the *state* courts. *State ex rel. Cleary* v. *Hopkins Street Building & Loan Ass'n.,* 217 Wis. 179, 257 N. W. 684, affirmed, *Hopkins Federal Savings & Loan Ass'n.* v. *Cleary,* 296 U. S. 315, and *First Federal Savings & Loan Ass'n. of Wisconsin* v. *Loomis, Atty. Gen. of Wisconsin,* 97 F. 2d 831 (C. A. 7), establish that a quo warranto proceeding may be brought in the Wisconsin courts.

Furthermore, in view of the broad authority of the Attorney General of Wisconsin to prosecute actions in which the state has an interest (Wis. Stat. § 14.53) it would seem that he could maintain in the appropriate court a suit to enjoin the alleged violation of state law by the Milwaukee association. See *In re Debs,* 158 U. S. 564, 584; *United States* v. *American Bell Telephone Co.,* 128 U. S. 315; *United States* v. *City of San Francisco,* 310 U. S. 16, 31;

United States v. *United Mine Workers of America*, 330 U. S. 258.[4]

Since other remedies are available to the state, the information should be dismissed.

IV.

The regulation of the Federal Home Loan Bank Board authorizing federal savings and loan associations to establish agencies is valid.

For the reasons stated above we do not believe the Court is called upon to reach the merits of the case presented by the State of Wisconsin. If the Court does, however, reach the issue as to whether the challenged regulation of the Federal Home Loan Bank Board is valid, that will furnish an additional reason for dismissing the information. For it is plain that Wisconsin's attack on the federal regulation is completely lacking in merit.

38 The authority of the Federal Home Loan Bank Board to provide by regulation for the establishment of branches or agencies has been upheld in three cases: *First National Bank of McKeesport, et al.* v. *First Federal Savings and Loan Association of Homestead*, 225 F. 2d 33 (C. A. D. C.); *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Ass'n.*, 187 F. 2d 564 (C. A. 3), cert. den. 342 U. S. 816;[5] and *Springfield Institution for Sav.* v. *Worcester Federal Savings & Loan Ass'n.*, 107 N. E. 2d 315

4. If the Attorney General of Wisconsin were correct in his view that the regulatory provisions of Chapter 215 of the Wisconsin Statutes are validly applicable to federal savings and loan associations, that chapter would provide an additional remedy of having the savings and loan commissioner take possession of the association. See § 215.70.

5. The brief of Wisconsin cites this case in the district court (92 F. Supp. 481) without indicating that it was also decided by the Court of Appeals.

(Mass.), cert. den. 344 U. S. 884. Those three cases specifically involved the Bank Board's authority to provide for branches of federal savings and loan associations rather than agencies; but since branches perform more comprehensive functions than agencies (see footnote 1, p. 2 above), those decisions *a fortiori* sustain the validity of the agency aspect of the regulation. Since those three decisions contain such a comprehensive discussion of the whole issue, we do not feel that any further discussion in this brief is necessary. There are no judicial decisions contrary to these three cases.[6]

In his brief (pp. 8-9) the Attorney General of Wisconsin asserts that the State of Wisconsin has made its policy decision that it is not desirable to permit savings and loan associations to have branches or agencies. Wisconsin is, of course, free to adopt such policy as it chooses with respect to state savings and loan associations. As to federal associations, however, Congress has specifically delegated the function of making that policy decision to the Federal Home Loan Bank Board, not to the states (12 U. S. C. 1464 (a)). As stated in the *North Arlington* case:

39 Here is an area where the Board is given the duty and authority to make policy. It is supposed to find out what the practices of these institutions are and give primary consideration to the best ones.

What is the practice with regard to branch offices? According to a committee report on a bill to amend the present act, only six states have statutes which prohibit the establishment of branch offices by building and loan associations. Thirteen states specifically au-

6. The Attorney General of Wisconsin complains that the Supreme Court of the United States has never ruled upon this issue. It denied certiorari in both the *North Arlington* and *Springfield* cases, presumably because it felt that the challenges to the validity of the Bank Board's regulation were so lacking in merit as to be unworthy of consideration by the Supreme Court.

> thorize them and twenty-nine have not legislated upon the subject. Congress put the duty upon the Board to decide what was the best practice and to give consideration to it. The Board did so by authorizing branches under conditions set out in its Regulations. This, it seems to us, is a very strong argument for concluding that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment. (187 F. 2d at 565-6.)

The *Springfield* case points out that Congress intended that the Bank Board regulations with respect to branches and agencies should "be of uniform application throughout the country," rather than vary from state to state. (107 N. E. 2d at 318.) See also *Franklin National Bank of Franklin Square* v. *New York*, 347 U. S. 373.

The Attorney General of Wisconsin seems to urge that because Congress, when it enacted the National Bank Act, adopted a policy of having national banks conform to state law as to branches, it did the same thing when it enacted the Home Owners' Loan Act of 1933. The fact is that Congress did not adopt a conformity-to-state-law policy in the Home Owners' Loan Act of 1933, as is explicitly recognized in the *Springfield* and *North Arlington* cases and in *People of State of California* v. *Coast Federal Sav. & Loan Ass'n*, 98 F. Supp. 311, 318-9 (S. D. Cal.). In *First Federal Savings & Loan Assn. of Wisconsin* v. *Loomis, Atty. Gen. of Wisconsin*, 97 F. 2d 831, which rejected Wisconsin's challenge to the right of federal savings and loan associations to do business in Wisconsin without state authorization, the Court of Appeals for this circuit affirmed a holding that a federal savings and loan association "is under the sole authority and control of the laws of the United States."

The Attorney General of Wisconsin makes the further contention that if, as the above cited cases hold, Congress has delegated to the Bank Board the authority to lay

down the policy as to permitted branches and agencies
40 of federal savings and loan associations, the Bank Board, by permitting federal associations to establish agencies of limited powers without specific approval by the Bank Board, has invalidly subdelegated its function. Although the argument is not clear to us, the Attorney General of Wisconsin seems to contend that any such "subdelegation" would constitute an unconstitutional delegation of legislative authority.[7]

Actually to permit federal associations to establish such agencies as they please without approval of each particular agency by the Bank Board is not a real delegation of legislative authority at all. The decision whether a particular association should be permitted to have an agency is not an appropriate matter for legislation, it would be absurd to expect Congress to pass a special law everytime a federal association wished to open an agency office. The Wisconsin business corporation law permits a business corporation to establish offices when and where it pleases throughout the world, without requiring administrative permission. Wisconsin Statute § 181.04(9). Does the Attorney General of Wisconsin consider that an unconstitutional delegation of legislative authority?

In the Home Owners' Loan Act of 1933 Congress vested in the Federal Home Loan Bank Board the function of regulating federal savings and loan associations, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U. S. C. 1464(a). That was a valid delegation of authority to the Bank Board, which the Board has exercised by concluding that the "best practices" permit federal associations to decide for themselves when and

[7] In the light of 28 U. S. C. 2282 there would seem to be some doubt as to whether that issue may be considered by a single district judge.

where to open agencies. *Fahey* v. *Mallonee*, 332 U. S. 245, 249-50, and the *North Arlington* and *Springfield* cases, *supra*, sustain the constitutionality of that delegation. The *Fahey* case distinguishes *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Corp.* v. *United States*, 295 U. S. 495, relied on by Wisconsin.

41 Accordingly, this information should be dismissed on the ground that Wisconsin has no case on the merits, if the Court ever reaches that issue.

Conclusion.

For the reasons stated above, the Court should dismiss the information in the nature of quo warranto filed by the Attorney General of Wisconsin.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice,
Attorneys for the United States,
and the Federal Home Loan
Bank Board.

42 WEB:DBH:mm
29-85-180

Honorable Vernon W. Thomson,
Attorney General,
State of Wisconsin,
Madison, Wisconsin.

Dear Mr. Thomson:

Your letter of October 29 to the Attorney General with respect to the establishing of agencies by federal savings and loan associations has been referred to me for reply.

I understand that you have communicated with the Home Loan Bank Board about this matter and have received its views.

As you state in your letter, the regulations of the Home Loan Bank Board provide that a federal savings and loan association may, without specific approval by the Board, establish agencies which are limited to the functions of servicing of loans and contracts and the management or sale of real estate owned by the association. By those regulations federal savings and loan associations may not establish branch offices or agencies which perform broader functions without express approval by the Home Loan Bank Board (24 C. F. R. (1954 Supp.), § 145.15).

You point out that the establishing of such agencies is contrary to the policy of the State of Wisconsin in that State banks and savings and loan associations are not permitted to establish branches or agencies of any kind.

As you may know, the authority of the Home Loan Bank Board to authorize federal savings and loan associations to establish branch offices has been the subject of judicial decision. In *Springfield Institution v. Worcester Federal Savings & Loan Assn.*, 329 Mass. 184, 107 N. E. 2d 315, cert. denied 344 U. S. 884, the Supreme Judicial Court of Massachusetts held that under the Home Owners' Loan Act of 1933 the Home Loan Bank Board may authorize branch offices of federal associations even where the establishment of such branches is contrary to State law. The Bank Board's authority to authorize such branches was

also upheld in *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Assn.*, 187 F. 2d 564 (C. A. 3). In two recent unreported cases the District Court for the
43 District of Columbia has again sustained this authority of the Bank Board. There are no judicial decisions to the contrary.

Your letter points out that in the National Bank Act (17 U. S. C. 36) Congress has adopted the policy of limiting branches of national banks to the extent that State banks are permitted to establish branches. In the *North Arlington* case, however, the court pointed out that Congress in enacting the Home Owners' Loan Act of 1933 did not choose to adopt this same policy.

In the light of these decisions I am sure you will appreciate why the Attorney General considers that it would be inappropriate for him to institute a quo warranto action to challenge the establishment of agencies by the federal savings and loan association in Milwaukee, even assuming that quo warranto would be the appropriate type of proceeding in such a situation. Accordingly, I regret that we cannot comply with your request to have such an action instituted in the name of the Attorney General.

Sincerely yours,

Warren B. Burger,
Assistant Attorney General.

49 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—6475) * *

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

(Filed Mar. 26, 1956. Dale E. Ihlenfeldt, Clerk.)

To: Russell and Bridewell,
Attorneys,
7 South Dearborn Street,
Chicago, Illinois.

Jack Werner,
Attorney,
741 No. Milwaukee Street,
Milwaukee, Wisconsin.

Edward G. Minor, U. S. Attorney,
Federal Building,
Milwaukee, Wisconsin.

Please take notice that the undersigned will move this court at the court room in the Federal Building in the city of Milwaukee, Wisconsin, on the 29th day of March, 1956, at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for entry of summary judgment herein in favor of the plaintiff against the defendant for the relief prayed for in the complaint, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon the pleadings, proceedings, and depositions heretofore had herein.

Dated this 23rd day of March, 1956.

Vernon W. Thomson,
Attorney General of Wisconsin,

Stewart G. Honeck,
Deputy Attorney General,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,

Stewart G. Honeck,
Attorneys for Plaintiff.

P. O. Address:
Room 114 East,
State Capitol,
Madison 2, Wisconsin.

50 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MOTION BY PLAINTIFF FOR SUMMARY JUDGMENT.

Plaintiff moves the court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the plaintiff for the relief demanded in his complaint, on the ground that there is no genuine issue as to any material fact in this action and that plaintiff is entitled to a judgment as a matter of law, as appears from the pleadings, proceedings and depositions on file in this action.

Dated this 23rd day of March, 1956.

Vernon W. Thomson,
Attorney General of Wisconsin.

Stewart G. Honeck,
Deputy Attorney General,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,
Attorneys for Plaintiff.

P. O. Address:
Room 114 East,
State Capitol,
Madison 2, Wisconsin.

51 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

STIPULATION.

(Filed Mar. 29, 1956. Dale E. Ihlenfeldt, Clerk.)

The parties to this case stipulate as follows:

1. The State of Wisconsin is one of the 48 sovereign states of the United States of America, and is the owner of almost $30,000,000 in loans upon homes of veterans in the State of Wisconsin; that most of said loans are secured by second mortgages which are junior to first mortgages held by chartered savings and loan institutions and other supervised agencies; that the security of said second mortgages is dependent upon the maintenance of a sound system of financial institutions in the State of Wisconsin.

2. In Wisconsin and many other areas of the United States, branch banks and branch agencies of state savings and loan associations are prohibited by law or state practice, and in some cases prohibited unless approved by properly authorized governmental agencies, and the National Bank Act limits branches of national banks [as] stated in paragraph 4 of the Information.

3. The rules and regulations for federal savings and loan associations as to home office, branch offices, agencies and change of office location prescribed by the Federal
52 Home Loan Bank Board, are set forth in sections 145.13, 145.14, 145.15 and 145.16 of the Official Rules and Regulations for the Federal Savings and Loan system.

4. The position of Wisconsin on this subject is as stated in section 215.02 (2) of the Statutes of the State of Wisconsin.

5. The depositions of John O'Neill and Sylvia Dockery may be made a part of the record in this case the same as though their testimony were given in open court and those depositions accurately describe the operations carried on at the agencies of the defendant.

6. The Attorney General of Wisconsin requested, and the Attorney General of the United States declined to institute a proceeding in the nature of quo warranto as alleged in paragraph 10 of the Information.

Dated this 29th day of March, A. D. 1956.

Vernon W. Thomson,
Attorney General of Wisconsin,
Jack C. Werner,
Horace Russell,
Attorneys for Defendant,
Donald B. MacGuineas,
Attorney, Dept. of Justice.

53 UNITED STATES DISTRICT COURT.

* * (Caption—6475) * *

ORDER.

(Filed Mar. 29, 1956. Dale E. Ihlenfeldt, Clerk.)

This cause came on to be heard on March 29, 1956, on the motion of the United States of America and the Federal Home Loan Bank Board for leave to intervene; and it appearing that the State of Wisconsin, and defendant, First Federal Savings and Loan Association, have no objection to a motion to intervene on the part of the Federal Home Loan Bank Board;

It Is Hereby Ordered: That the Federal Home Loan Bank Board is hereby given leave to intervene as a party defendant.

It Is Further Ordered: That the motion for intervention by the United States is taken under submission by the Court.

Dated at Milwaukee, Wisconsin, this 29th day of March, 1956.

Robert E. Tehan,
United States District Judge.

54 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

ORDER.

(Filed Mar. 18, 1957. Dale E. Ihlenfeldt, Clerk.)

The above entitled action having come on for hearing before the Court, and the Court having heard the arguments of counsel, and having read the briefs submitted and being fully advised in the premises, and having this day filed its Opinion,

Now, Therefore, It Is Ordered: The motion of the defendant, First Federal Savings & Loan Association, and the intervening defendant, Federal Home Loan Bank Board, for judgment of dismissal of the action as to each of them, is hereby granted.

The motion of the plaintiff's relator, State of Wisconsin, for summary judgment, is hereby denied.

Dated, Milwaukee, Wisconsin, this 18th day of March, 1957.

Robert E. Tehan,
U. S. District Judge.

55 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

OPINION.

(Filed Mar. 18, 1957. Dale E. Ihlenfeldt, Clerk.)

The Attorney General of the State of Wisconsin has filed in the name of the United States, on the relation of the State of Wisconsin, a petition for leave to file an information in the nature of quo warranto against the defendant First Federal Savings and Loan Association in Milwaukee,

Wisconsin, requiring said defendant (hereinafter referred to as the Association) to declare by what right it asserts a charter and franchise to establish receiving stations in the County of Milwaukee at a distance from its principal location and in default thereof asking that a judgment of ouster issue vacating and forfeiting the charter asserted by the Association.

Following a hearing at which oral arguments of counsel were heard and written briefs submitted by the parties, this court, being of the opinion that the relator (hereinafter referred to as the State of Wisconsin) had made a showing that a substantial issue existed, ordered that it be granted leave to file its information in the nature of quo warranto.

Thereafter, this court granted the motion of the Fed-
56 eral Home Loan Bank Board (hereinafter referred to as the Board) to intervene as a party defendant.

The pleadings and a stipulation establish substantially the following fact situation:

The State of Wisconsin, one of the forty-eight states of the United States of America, is the owner of almost $30,000,000 in loans upon homes of veterans in the State of Wisconsin. Most of these loans are secured by second mortgages which are junior to first mortgages held by chartered savings and loan institutions and other supervised agencies. The security of said second mortgages is dependent upon the maintenance of a sound system of financial institutions in the State of Wisconsin.

In Wisconsin and many other areas of the United States, branch banks and branch agencies of state savings and loan associations are prohibited by law or state practices and in some cases prohibited unless approved by properly authorized governmental agencies. The soundness of conforming federal law to local practices has been recognized by the Congress itself in regard to national banks by the

provisions of the McFadden Act, which reads in part, Title 12 U.S.C.A. Section 36 (c):

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; [here follow similar provisions]."

In the State of Wisconsin, the prohibition against the operation or maintenance of branch offices or agencies is asserted in Section 215.02 (20) Wisconsin Statutes:

57 "(20) ONE OFFICE ONLY. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

The defendant Association was chartered by the United States of America on February 20, 1934 under the provisions of Section 5 of the Home Owners' Loan Act of 1933 as amended, 12 U.S.C.A. Section 1464, and the Rules and Regulations for Federal Savings and Loan Associations adopted by the Board.

By the provisions of the organic act, Section 5 of the Home Owners' Loan Act of 1933 as amended, the Board is required by the Congress of the United States, in the issuance of charters, to give primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States, to refuse to grant a charter without a judgment of the Board itself that a necessity exists for an association in the particular community to be served, and a finding that such association can be established without undue injury to properly conducted existing local thrift and home-financing institutions. 12 U.S.C.A. Sections 1464 (a), (c).

The specific provisions of the Board's Rules and Regulations relating to the establishment and operations of agencies is Regulation No. 145.15 which reads in material part:

> "Sec. 145.15 *Agency.* * * * A Federal association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions
> 58 or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs." (24 C.F.R. 1954 Supp. to 1949 Ed. Sec. 145.15.)

The defendant Association in apparent reliance on Regulation 145.15 and admittedly with the exercise of no judgment but its own, established and is operating three agencies in the County of Milwaukee, separate and at a distance from its main office.

It appears from the testimony contained in the depositions taken of two of the Association's employees, which testimony has been stipulated to as accurately describing the agencies' operations, that these agencies collected payments on mortgages, kept loan files and payment records, serviced loans, channeled insurance claims, transferred delinquent accounts to the main office, prepared daily trial balances and monthly reports, and answered purchasers' questions. Loans themselves were not negotiated at these agencies. Loan and savings account applications were referred to the main office and never taken by the agencies. Deposit payments on savings share accounts were received at the main office, not at the agencies.

Prior to the commencement of this action, the Attorney General of Wisconsin made a formal demand upon the Attorney General of the United States that he file an information in the nature of quo warranto against the defendant Association for the purpose of securing a judgment of ouster based on the usurpations described in the information. The Attorney General of the United States, however, formally declined to file such in information.

59 Upon the pleadings, proceedings, depositions and the stipulation in this action, the State of Wisconsin moved the court pursuant to Rule 56, Federal Rules of Civil Procedure, to enter judgment for it for the relief demanded in the information on the grounds that there is no issue as to any material fact in the action and the State of Wisconsin is entitled to judgment as a matter of law.

Prior to this motion, the defendant Association had moved for dismissal of the information on the grounds that this court had no jurisdiction, that the information stated no cause of action, and that the State of Wisconsin could have no standing in this court until administrative remedies had been exhausted. The intervening Board likewise moved for dismissal of the information on the grounds that the court lacks jurisdiction to grant the relief requested; that the State of Wisconsin has no authority to use the name of the United States in maintaining an action in the nature of quo warranto; and that the information fails to state a claim upon which relief can be granted.

Since certain of the motions for dismissal interposed by the defendants involve a consideration of matters beyond the pleadings filed in the case, these motions will be treated as motions for summary judgment under Rule 56, Federal Rules of Civil Procedure.

Before proceeding to a consideration of the questions of

law raised by these cross-motions for summary judgment, it should be pointed out that no party in resisting such motion of an adversary party contends that the motion should be denied by reason of the existence of a genuine issue of material fact.

60 At an earlier stage in this proceeding the State of Wisconsin apparently was not prepared to concede that the agencies involved in this action were operating as agencies "limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions" as described in Section 145.15 of the Board's Regulations. (24 C. F. R. 1954 Supp. to 1949 Ed. Section 145.15)

Accordingly, it caused depositions to be taken of two of the Association employees in respect of the operations and functions carried on in these agencies. While the State of Wisconsin has still not expressly conceded the fact, its failure to contend that the testimony given or that other evidence shown to be in existence and which could be adduced at a trial would prove otherwise, requires that it be held as established and beyond a question of fact that the services performed at these agencies are within the limitations of Section 145.15 of the Board's Regulations.

The assertion of the right of the State of Wisconsin or any person to bring an action in the nature of quo warranto without the consent of the Attorney General of the United States, raises a substantial question. This court is inclined, however, to the opinion that if the defendant Association in asserting the right to maintain agencies is asserting and usurping a prerogative and franchise not conferred upon it by its charter and is invading the sovereign prerogatives of the United States by whom the charter was granted, the sovereign State of Wisconsin has standing to employ the extraordinary writ of quo warranto to test the legality of the Association so to act. We are of

the further mind that the State of Wisconsin is not required to seek its remedy by use of the administrative procedure under the Act nor is it required to use less extraordinary remedies before resorting to quo warranto. We assume these procedural points, however, and do not decide them, since our decision does not turn upon them.

61 The validity or want of validity in the contentions of the respective parties on the merits of these proceedings can, we believe, be best evaluated against a background of the decisional law on the organic act and the rules and regulations established thereunder.

The Home Owners' Loan Act of 1933 authorizes the Federal Home Loan Bank Board, an unincorporated agency in the executive branch of the United States Government, to issue charters for the creation of Federal savings and loan associations. The standards for the issuance of charters to such associations are set forth in the following sections of the organic act:

Section 1464.

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Association,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

"(c) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions."

The defendant association was chartered on February 20, 1934, under the provisions of the above sections and the rules and regulations for Federal savings and loan associations adopted by the Board.

62 The power of the Board so to issue such charters has been upheld as constitutional. *Fahey* v. *Mallonee*, 322 U. S. 245 (1947); *First Federal Savings & Loan Ass'n.* v. *Loomis*, (C. A. 7, 1938) 97 F. 2d 831.

The State of Wisconsin is not here challenging the right of the Board to have issued that charter and the right of the defendant Association to operate under it at least so far as its main office functions are concerned.

Under the organic act, the Board was given certain rule-making power with respect to Federal savings and loan associations. 12 U. S. C. Section 1464 (d). The resulting rules and regulations make provision among other things for the establishment and maintenance of both branches and agencies. Section 145.14 and Section 145.15 of the Federal Savings & Loan System [Revised].

Because the ultimate questions we here deal with involve the validity of those provisions that provide for the creation of branches and agencies, it would appear to be in order that we treat at some length the decision of the United States Court of Appeals for the Third Circuit, which in the case of *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Ass'n.* (C. A. 3, 1951) 187 F. 2d 564, cert. denied 342 U. S. 816 (1951), sustained the power of the Board to establish branches. In that case, the plaintiff was a national bank doing a general banking business in North Arlington, New Jersey. The defendant, whose home office was in Kearny, New Jersey, a town adjoining North Arlington, had established and was operating a branch office in North Arlington. The branch office was about a half mile from the home office of the defendant,

63 and was established with the approval of the Federal

Home Loan Bank Board. The plaintiff national bank complained of this operation, and asked that it be declared illegal. The plaintiff there placed much reliance on the fact that the statute does not give explicit authority to the Board to permit associations to establish and maintain branch offices. Upon an appeal from judgment of dismissal by the District Court, the Court of Appeals passed over the procedural points and addressed itself to the merits of the case.

In concluding that the authority to establish branch offices is vested in the Board by the very terms of the congressional enactment, the Court of Appeals used the following language (Page 565):

> "The basic statute is the Home Owners' Loan Act of 1933, 12 U. S. C. A. Sections 1461-1468. Provision for Federal savings and loan associations begins with Section 1464. The statute is one of the type which states a policy, provides for the project under consideration, lays down some general rules and prohibitions and leaves details to the Board which is authorized by Section 1463. The statutory delegation of authority to the Board has been held constitutional."

Because explicit authority to the Board to permit branch offices cannot be found in the statute, the court dealt with the words and phrases in the statute on which each side respectively relied to show that such authority was intended, or contra, not intended to be given. Upon analysis, the court "granted that a microscopic examination of the statutory words alone does not bring one to any conclusion not open to reasonable differences of opinion." The court, however, found "strong argument for the existence of the power on the part of the Board" from other words of the statute (Page 565):

> "Strong argument for the existence of the power on the part of the Board to establish a branch office for an association we think comes from other words of

the statute. The Board is authorized in Section 1464 (a) to issue charters for Federal savings and loan associations 'giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.' Here is an area where the Board is given the duty and authority to make policy. It is supposed to find out what the practices of these institutions are and give primary consideration to the best ones.

What is the practice with regard to branch offices? According to a committee report on a bill to amend the present act, only six states have statutes which prohibit the establishment of branch offices by building and loan associations. Thirteen states specifically authorize them and twenty-nine have not legislated upon the subject. Congress put the duty upon the Board to decide what was the best practice and to give consideration to it. The Board did so by authorizing branches under conditions set out in its Regulations. This, it seems to us, is a very strong argument for concluding that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment."

In further support of its holding that the Board has power to create branches, the court relied upon the principle that a contemporaneous interpretation by the authorized administrative agency is of weight in determining what the powers are. In dealing with this point, the court referred to the fact that the provision for the granting of permission for the operation of branch offices has been included in the Rules and Regulations since 1934, and that as of August 19, 1959, there were 1498 Federal savings and loan associations, 69 of which were then operating 72 branches in 22 states and the District of Columbia. The court further emphasized that the weight to be given to this agency's interpretation of authority is emphasized by the subsequent legislative history, all of which implied assent to the existence of the power.

53 In addition, the Court of Appeals in the *North Arlington* case was pressed with the decisions under the National Banking Act to the effect that national banks could not under the original law have branches, and that the privilege given to them to establish branches has been very strictly limited. The court after pointing out the substantial difference between the purpose and function of national banks and savings and loan associations rejected the analogy drawn to the limitations of the powers of the national banks as not very helpful.

In the following year of 1952, the power of the Board to provide for the creation of branches of an association was upheld in *Springfield Institution v. Worcester Federal Savings & Loan Ass'n.*, 329 Mass. 184, 107 N. E. 2d 315 (1952) cert. denied 344 U. S. 884 (1952), and again in 1955 in *First National Bank of McKeesport v. First Federal Savings & Loan Ass'n. of Homestead*, 225 F. 2d 33 (C. A. D. C. 1955). These three cases constitute the decisional law on this point. All three are appellate court decisions in two of which certiorari was sought and denied.

In this setting of the case law, the position of the defendants on the merits can be simply put: (1) The power of the Board as expressed in Section 145.14 to provide for the establishment and maintenance of branches has been sustained in every appellate test; (2) The allowable operations and functions of an agency[1] set up under Section

1 The word "agency" for the purposes of this opinion shall be understood to mean those types of operation referred to in the latter part of Section 145.15 "which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions." It is necessary to make this distinction since there appears to be a less limited type of agency referred to in the fore-part of Section 145.15, for which it is needful to obtain the Board's prior approval.

145.15 are substantially less than those exercisable by
66 a branch; (3) A fortiori, the power of the Board to provide by Section 145.15 for the establishment and maintenance of agencies must be upheld.

The State of Wisconsin, on the other hand, appears to have substantially shifted its position in the latter stages of the case from the approach originally reflected in its first brief. In the last proceeding in this case before the court, in the rebuttal argument on the oral hearing on the motions, the State of Wisconsin, through one of its Assistant Attorneys General, conceded that the State was "trying to overrule" the *North Arlington*, *Springfield* and *McKeesport* cases.[2] This position is in sharp contrast to the approach taken in the first brief, namely, that previous cases involving the power of the Home Loan Bank Board to approve branch offices upon specific application have no relation to the instant case.[3]

67 Although these inconsistent approaches to the applicability of the decisional law in this case are not brought in the alternative, we do not think the State of

2. "We do concede we are trying to overrule the 3 cases that counsel have referred to and cited in their briefs. We don't think the arguments we have made have been considered and we are addressing them to this court and in the only proceeding that we think we can stay in court on." (Oral statement made on rebuttal on oral argument by Roy G. Tulane, Assistant Attorney General of the State of Wisconsin.)

3. "Moreover, we point out that previous cases involving the power of the Home Loan Bank Board to approve branch offices upon specific application have no relation to the present case. In regard to the receiving agencies which are now challenged, the Home Loan Bank Board by its regulations attempted to sub-delegate its claimed power to authorize such agencies to the federally chartered association itself, and to allow the association to determine whether or not it wanted such agencies, and how many of such agencies it wanted."
(Brief of Relator filed December 13, 1954, Page 11.)

Wisconsin can be heard to complain if we so treat them. As we understand it, the position of the State of Wisconsin then is: (1) The *North Arlington*, *Springfield* and *McKeesport* cases were not correctly decided and should not be followed by this court; (2) That in the event this court refuses to depart from these precedents for the Board to establish branches under the procedures set forth in Section 145.14, nevertheless this court must find that these precedents are inapplicable and distinguishable in determining under Section 145.15 whether this Board has the power to "sub-delegate" to officers of various associations the discretion as to whether or not such associations will establish agencies.

In attacking the correctness of the legal conclusions reached in the *North Arlington*, *Springfield* and *McKeesport* cases, the State of Wisconsin has suggested that it is here advancing arguments not considered by those courts.[4] We must confess to a sense of mystification at this claim. A careful reading and re-reading of the briefs filed by the State of Wisconsin and the report of the oral argument have failed to disclose therein any contention or fact that was not advanced and considered in those cases.

The only two grounds that we have discovered as a reason for disapproval of the above holdings are: (1) There is no explicit language in the statutes giving the Board
68 power to establish branches and agencies; and (2) The policy reflected in the National Banking Act requiring conformity to state and local policy on the matter of branches and agencies is applicable to the Home Owners' Loan Act and institutions chartered thereunder.

In respect to the State's first subpoint, no extended treatment seems necessary. The defendants at no time have ever claimed that there is explicit language in the statute giving the Board power to establish branches and agencies.

4. See Footnote 2.

What the defendants do claim and rely on is the construction and holding of the *North Arlington* case "that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment."

The plaintiff has failed to point out any reason or fact why this is not a correct construction of the statute. Perforce we hold to the interpretation made by that appellate court.

Despite the fact that the State of Wisconsin has obviously devoted a great deal more of its efforts to the argument that the policy and decisional law attending the National Banking Act is here applicable, we find nothing that is new and was not considered and disposed of in the *North Arlington* case in the following language: (Page 567)

> "Finally, there is a consideration of a point on principle which may not be amiss in this highly technical business of statutory interpretation. We were pressed with the decisions under the National Banking Act to the effect that national banks could not under the original law have branches and that the privilege given to them to establish branches has been very
69 strictly limited. All that is tied up with the historical reasons back of the establishment of national banks and the altogether different type of administrative control exerted over them. We do not think that the analogy drawn to the limitations of the powers of the national banks is very helpful in our questions here.
>
> "These savings and loan associations do some of the same things which banks do, obviously. But they do not do a general banking business. They are set up under the declared Congressional purpose to provide thrift institutions in which people may invest their funds and to provide for the financing of homes. There is no danger of any single association becoming a giant monopoly. Its investment area is limited. The associations themselves can only be set up when in the judgment of the Board, those applying for the

charter are persons of good character and responsibility and there is a need for the institution in the community and a probability of its success. The Board is likewise limited in the granting of the charter to situations where the new association can be established without undue injury to properly conducted local thrift institutions already there. Business with this type of institution is done, so far as payments to it are concerned, in small amounts and at frequent intervals. A man gets one loan on his home. That has to be passed upon by the directors at a meeting in the main office no doubt. But the payments on his loan or his subscription to shares will be a matter where convenience in the location of the association's office is of some concern to the customer. It may well be that it is good practice, instead of chartering a large number of associations too small to carry on successfully, to let an established concern do business through branches for the convenience of its customers. If, under all the restrictions placed upon the Board by the statute, it seems to those charged with the decision that a branch office of an established association should be permitted, we think it would be unfortunate to construe the statute to prevent that exercise of business judgment. Such a construction would tend to defeat the policy declared in the legislation."

Since the National Banking Act is wedded to the policy of conformity to state usages and laws, what the State Judicial Court of the State of Massachusetts stated in the case of *Springfield Institution for Sav. v. Worcester Federal Savings & Loan Ass'n., et al*, 107 N. E. 2d 315, (1952) is significant: (Page 318)

"We see no reason to suppose that Congress intended that the board should make regulations which should not be of uniform application throughout the country. See *Hopkins Federal Savings & Loan Association v. Cleary*, 296 U. S. 315, 333, 56 S. Ct. 235, 80 L. Ed. 251.

It does not ensue because formerly under the national bank law the power to establish branches was

withheld, *First National Bank in St. Louis v. State of Missouri, et inf. of Barrett*, 263 U. S. 640, 44 S. Ct. 213, 68 L. Ed. 486, that Congress did likewise in the home owners' loan act. *California v. Coast Federal Savings & Loan Association*, D. C., 98 F. Supp. 311, 319. See *Eddy v. Home Federal Savings & Loan Association*, 60 Cal. App. 2d 42, 44-45, 140 P. 2d 156.[4]

The foregoing authority is more than sufficient to reject the contention of the State of Wisconsin in this respect. Nevertheless it should be observed that efforts apparently substantial and determined have been made in the Congress of the United States to impress upon the Home Owners Loan Act the policy of the Mc Fadden Banking Act of conformity to the state law and practice with respect to financial institutions.

If the Board's policy with respect to branches and agencies was not agreeable to the intent of Congress it had the opportunity to change it in 1949, 1954 and 1955.[5]

4. In 1949, as indicated in the North Arlington opinion, bills in the 81st Congress (H. R. 4710 and S. 2006) were introduced providing for limitations upon the power of the Board with respect to the establishment of branch offices. These bills did not become law. See Sen. Rep. No. 1128, 81st Cong. 1st Sess. (1949).

In 1953, Bill S975, was introduced in the Senate and succeeded in being passed by the Senate in the following year. 100 Cong. Rec. 6001-6011. This proposed law limited association branches to states where branches were allowed to state savings and loan associations and mutual savings banks by the particular state law or custom. Rep. of Comm. of Banking and Currency, Sen. Rep. No. 1156, 83rd Cong. 2nd Sess. 1 (1954). However, this bill was never reported out of the House Committee on Banking and Currency.

In 1955, companion Senate and House bills, S972 and H. R. 5364, were introduced in the 84th Congress, 1st Session. They were identical to S975 of the 83rd Congress. Rep. of Comm. on Banking and Currency, Sen. Rep. No. 518, 84th Cong. 1st Session 1 (1955). Although the Senate passed S972 on June 22, 1955, the House failed to pass the companion bill.

appears to this court that the fact that the Congress
71 has on each such occasion failed to pass measures calculated to bring conformity to state law and usages is entitled to some weight.

It must be abundantly clear that this court must decline the plea of the State of Wisconsin that it depart from the holdings of the cases of *North Arlington National Bank v. Kearny Federal Savings and Loan Association*, 187 F. 2d 568 (C. A. 3, 1951), cert. denied 342 U. S. 816 (1951), *Springfield Institution v. Worcester Federal Savings & Loan Ass'n*, 329 Mass. 184, 107 N. E. 2d 313 (1952), cert. denied 380 U. S. 884 (1952) and *First National Bank of McKeesport v. First Federal Savings & Loan Ass'n of Homestead*, 205 F. 2d 39 (C. A. 3, 1953).

The power of the Board to establish branches pursuant to Section 545.9 having now been determined, there remains only the question whether that Board likewise has the power to provide for the establishment of mobile agencies pursuant to Section 545.8. Analysis of these two sections would appear to be the first step:

"Section 545.8 *Branch offices.* No Federal association shall establish or maintain a branch office without the prior written approval of the Board. Each application by a Federal association for authority to establish or maintain a branch office shall state the need for such branch office, the convenience to be performed, the economics and other factors to be considered, the estimated annual volume of business, income and expenses of such branch office, and such other information as the Board may require. Approval of an application may be conditioned upon the association's maintaining a prescribed annual budget of such amount and for such period of time as the Board may determine. Any branch office established by a Federal association without the approval required by this section shall be considered by the Board to be a mutually agreed upon termination of the status of such office as a branch office, as authorized by the terms of approval. A Federal association shall maintain adequate records of all transactions of each branch office and shall make such reports to the Board with respect to each branch office as the Board may require. Each branch office shall be subject to examination by the Board to the same extent as the home office of the association, and such examination may include examination of such books, records, accounts, and other documents of the association as relate to such branch office. The Board may require the association to furnish it such information as it deems necessary with respect to any branch office, and may require the association to furnish it such information as it deems necessary with respect to any branch office, and may require the association to furnish it such information as it deems necessary with respect to any branch office, and

"Section 145.15. *Agency.* * * * A Federal association may, without approval by the Board, establish or
72 maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs."

From a reading of the above sections, there are but two differences that appear material:

1. Function. The allowable functions and operations of a branch are very substantially broader than those permitted in a limited agency. The approach used in defining the permissible activities of each is revelatory of their broad differences. In describing the vastly greater operations of a branch, the Board specified only the one function that could not be performed by the branch, that is, the approval of loans; all business otherwise being transactable. On the other hand, in defining the functions of a limited agency, the Board precisely spelled out what such agency could do and thereby excluded all other types of operation.

2. Procedure. Procedurally, it appears that no branch office may be established or maintained by an association without the prior written approval of the Board, whereas a limited agency or agencies may be established without prior leave or approval of the Board and solely at the discretion of the officers of the association. Stated another way, it appears that a certificate of approval is issued by the Board only after study has been made of the need for

such branch, the functions to be performed, the personnel and office facilities to be provided, the estimated annual
73 volume of business and the proposed annual budget.

In addition to the criteria set forth in the rule, it appears that in recent years the Board also applies the same tests set out in Section 5(c) of the Home Owners' Loan Act of 1933 that is applied to the application for the original charter. Reports of Committee on Banking and Currency, Sen. Rep. 1186, 83rd Congress, 2nd Session 2 (1954); Sen. Rep. 318, 84th Congress, 1st Session 2 (1955). These tests and the deliberations and judgment consequent thereto are of course in sharp contrast to the complete void of activity or participation by the Board in the establishment of limited agencies.

It seems clear to this court that the same reasoning and authority that established the power of the Board to create branches applies a fortiori with equal force and cogency to the Board's power in respect to the creation of agencies of limited function, provided that in so doing it exercises this power itself, and in so doing, applies the standards expressed or implicit in the statute and the Rules and Regulations thereunder. Indeed, it would be a most curious result to find power on the major plane and deny it on the minor.

Our question therefore narrows down to this: Has an agency of a limited character such as we have in the instant case been legally established where the association itself has applied the tests of need, personnel, location and the like, and the Board itself has failed to take any part in the decision?

Before deciding whether failure of the Board to so act constitutes abdication of duty or sub-delegation of powers, it is necessary to determine what, if anything, is being abdicated or delegated.

74 The establishment of limited function agencies like

the ones involved in the instant case was recognized as far back as 1943. Although Section 145.15 did not become effective in its present form until August 15, 1949, as a part of a general revision of the Rules of the Federal Savings and Loan System (see 14 F. R. 3980, 3991 (1949)), a rule unmbered Section 143.16(c), entitled like the present Section 145.15 "Agency", was in effect. In this old 143.16 (c) there was a provision which eliminated the requirement of the Board administration to give prior approval to agencies servicing mortgage loans and real estate. Before January 1, 1949, this rule was numbered 203.16(c). See 13 F. R. 8273 (1948). During the time when it was numbered in this way, and to be precise on April 27, 1943, an amendment was filed eliminating the requirement of Board administration approval of agencies servicing mortgage loans and real estate. Builetin 19, 8 F. R. 5579 (1943). In this bulletin it is flatly stated:

> "This amendment is deemed to be of a minor and procedural character within the provisions of paragraph (c) of Section 201.2 of the rules and regulations for the Federal Savings and Loan System."

It thus appears from the above history of the development of the Regulation pertaining to limited agencies that the Board has since 1943 treated this limited phase of savings and loan operations as *de minimis*.

An administrative body cannot by its interpretation of the statute under which it operates increase its power beyond that given by the legislative body, but a contemporaneous interpretation by the authorized administrative agency is of weight in determining what the powers are. Since 1943, there has been included in the Rules and Regulations for the Federal Savings and Loan System a provision for the granting of permission for the operation
75 of a limited function agency without prior approval of the Board.

The State of Wisconsin has nowhere demonstrated or claimed that these restricted operations of a limited function agency are other than of a *de minimis* character. It has at no time adduced proof that undue injury or any injury whatsoever has resulted to properly conducted existing local thrift and home-financing institutions, nor has it made any showing that the establishment of such limited function agency with or without the prior approval of the Board is not consonant "with the best practices of local mutual thrift and home-financing institutions in the United States."

The State of Wisconsin has failed to acquit itself of its burden of proof in these respects, if proof there be. We are constrained to agreee with and follow the interpretation of the administrative board that these limited operations are of such minor and procedural character that they do not require formal and deliberate Board action such as is provided for in respect to other phases of savings and loan association activities.

The fears of the State of Wisconsin that a Federal savings and loan association or associations would be able to blanket an entire county are in our opinion without warrant. The comprehensive supervisory powers given to the Board by the Act and Rules and Regulations, if not the sheer economics of the situation, seem to us to be an effective control against abuses or excesses.

It is the opinion of this court that the Board has the authority to establish limited function agencies and to do so in the manner provided in Section 145.15.

76 We further conclude that First Federal Savings and Loan Association in establishing the three limited function agencies did not assert and usurp a prerogative and franchise not conferred upon it by its charter and did not invade the sovereign prerogatives of the United States by whom the charter was granted. We find that in fact it

did establish such agencies rightfully and legally and in pursuance of a valid Regulation, Section 145.15.

The motion of the defendant, First Federal Savings and Loan Association, and the intervening defendant, Federal Home Loan Bank Board, for judgment of dismissal of the action as to each of them is hereby granted.

For the reasons set forth in this opinion which shall stand as and for findings of fact and conclusions of law in this case, the motion of the plaintiff's relator, State of Wisconsin, for summary judgment is hereby denied.

Dated, Milwaukee, Wisconsin, this 18th day of March, 1957.

Robert E. Tehan,
U. S. District Judge.

77 UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

JUDGMENT OF DISMISSAL.

(Filed Mar. 19, 1957. Dale E. Ihlenfeldt, Clerk.)

Order for Judgment having been entered herein on the 18th day of March, 1957, granting the motion of the defendant, First Federal Savings & Loan Association, and the intervening defendant, Federal Home Loan Bank Board, for judgment of dismissal of the action as to each of them, and denying the motion of the plaintiff's relator, State of Wisconsin; for summary judgment;

It Is Ordered that the above-entitled action be and the same is hereby dismissed without costs to either party.

Dated at Milwaukee, Wisconsin, this 19th day of March, 1957.

Dale E. Ihlenfeldt,
United States District Clerk.

78 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

(Filed Apr. 17, 1957. Dale E. Ihlenfeldt, Clerk.)

The deposit by the State of Wisconsin with the Clerk of this Court of a state check in the sum of $250 as security for costs is hereby approved.

Dated this 17th day of April, A.D. 1957.

Robert E. Tehan,
Judge of the U. S. District Court for the Eastern District of Wisconsin.

79 IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

United States of America, ex rel. State of Wisconsin *Plaintiff,* *vs.* First Federal Savings & Loan Association and Federal Home Loan Bank Board, *Defendants.*	Civil Action 6475

NOTICE OF APPEAL.

(Filed Apr. 17, 1957. Dale E. Ihlenfeldt, Clerk.)

Notice Is Hereby Given, That the United States upon the relation of the State of Wisconsin, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 19, 1957.

Dated this 17th day of April, A.D. 1957.

Stewart G. Honeck,
Attorney General of Wisconsin,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,
Attorneys for Appellant.

Post Office Address:
Room 114 East,
State Capitol,
Madison 2, Wisconsin.

80 CERTIFICATE OF CLERK.

United States of America,
Eastern District of Wisconsin. } ss:

I, Dale E. Ihlenfeldt, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that the writings annexed to this certificate are the original pleadings, judgment, and other papers; Depositions of John O'Neill and Sylvia Dockery (Transcript included separate from file of pleadings); in the case: United States of America ex rel. State of Wisconsin, *vs.* First Federal Savings & Loan Association, et al., Civil Action No. 6475.

In Testimony Whereof, I have hereunto set my hand and duly affixed the seal of said court at the City of Milwaukee, Wisconsin in said district, this 2nd day of May, 1957.

Dale E. Ihlenfeldt,
(Seal) *Clerk.*